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THE GEORGIA CHILD HEARSAY STATUTE AND THE SIXTH AMENDMENT: IS THERE A CONFRONTATION?

INTRODUCTION

Physical and sexual abuses of children have become recognized as significant social problems. Reports of child abuse have increased nationally from 669,000 in 1976 to 1,900,000 in 1985.¹ Moreover, experts believe that these figures are conservative because much additional abuse goes unreported to authorities.² Reports of child sexual abuse, particularly over the past ten years, have increased dramatically from less than 2000 in 1976 to 132,000 in 1986.³ The National Committee for Prevention of Child Abuse reported to Congress that in 1989 2,400,000 cases of child abuse were reported, 16% (386,400) of which involved sexual abuse.⁴ Figures of reported abuse in Georgia have increased in a similar manner.⁵

Unfortunately, actual statistics are not particularly meaningful because of the unknown numbers of unreported cases. Statistics are also difficult to use for comparative purposes because of

1. Josephine A. Bulkley, *The Impact of New Child Witness Research on Sexual Abuse Prosecutions*, in PERSPECTIVES ON CHILDREN'S TESTIMONY 208 (S.J. Ceci et al. eds., 1989) (relying on AMERICAN ASSOCIATION FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1985, 1987).

2. *Id.* at 208.

3. Gail S. Goodman et al., *Child Witnesses and the Confrontation Clause: The American Psychological Association Brief in Maryland v. Craig*, reprinted in 15 LAW AND HUM. BEHAVIOR 13, 17 n.2 (1991) (citing AMERICAN ASSOCIATION FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1986, 1988).

4. Diane Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691-94 n.17 (1991) (citing NATIONAL COMMITTEE FOR PREVENTION OF CHILD ABUSE, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES: THE RESULTS OF THE 1989 ANNUAL FIFTY STATE SURVEY, 1990). Although the latest comprehensive national statistics are for 1986, the National Committee for the Prevention of Child Abuse used the 1989 survey figures for purposes of reporting to Congress in 1990 regarding proposed legislation. *Id.*

5. GEORGIA DEPARTMENT OF HUMAN RESOURCES, STATE OF GEORGIA CHILD PROTECTIVE SERVICES PROFILE SFY 88, 89 & 90 (indicating that reports of abuse have risen from 36,225 in 1988 to 45,817 in 1990, noting, however, that in both cases, less than half of these reports were confirmed).

various definitions used when collecting data. Furthermore, it is impossible to determine whether the occurrence of child abuse is actually increasing or whether it is simply being reported more often. Regardless of the reason, the public is certainly more aware of the prevalence of child abuse than ever before.⁶

This growing awareness of the problem has led to the discovery of long-term effects on some victims of continued abuse.⁷ In response to this knowledge, society has become more and more inclined to believe that to protect children, alleged perpetrators of the abuse should be criminally prosecuted.⁸ Also, while child abuse was traditionally viewed as primarily familial abuse and was resolved within the juvenile court system, today's widespread emergence of reported familial perpetrators has contributed to an increase in criminal prosecutions.⁹

The prosecution of child sexual abuse presents myriad problems. The crime is unique in many ways. Usually the alleged incident takes place in private without the use of force and with no witnesses other than the victim and the perpetrator.¹⁰ Frequently, the child knows and has a relationship with the abuser.¹¹ Often there is no conclusive medical evidence.¹² By definition, the victim is a child, often one of tender years.¹³ In light of the high burden of proof required in criminal cases, these factors make both the availability and the presentation of evidence difficult.

In addition to the sparsity of direct physical evidence and lack of witnesses, the prosecutor faces a dilemma. Along with a duty

6. Tarek Howard, Note, *Child Sexual Abuse Prosecutions: Protecting the Child Victim and Preserving the Rights of the Accused*, 66 N.D. L. REV. 687 (1990).

7. Brief of Amici Curiae at 4, *Idaho v. Wright*, 497 U.S. 805 (Wyo. 89-260) (1990); see also, Roland Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 178 (1983), cited in Howard, *supra* note 6, at 687. ("[S]exual abuse of children is much more common and more damaging to individuals and to society than has even been acknowledged by clinical or social scientists.")

8. Bulkley, *supra* note 1, at 208.

9. *Id.* at 209.

10. Jean L. Kelly, Comment, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 CATH. U. L. REV. 1021, 1024 (1985).

11. Howard, *supra* note 6, at 688 (citing Summit, *supra* note 7, at 181).

12. Bulkley, *supra* note 1, at 209. Conclusive medical evidence cannot be obtained where the abuse is fondling. *Id.* Such evidence is also impossible to obtain if there is a long delay in the victim's reporting the abuse. *Id.*

13. See Kelly, *supra* note 10, at 1023. One study estimates that half of sexual abuse victims are under age eleven. *Id.*

to protect the public through prosecution of criminals, the state has a concomitant duty to protect children. Recent research confirms the concern of child advocates that the emotional stress on some children resulting from testifying in court in the presence of the defendant can be tantamount to revictimization of these children by the system.¹⁴ Research also indicates that testimony of traumatized children is not particularly credible or reliable.¹⁵

In response to the need to protect child victims, and in an effort to facilitate the prosecutability of child sexual abuse cases, the American Bar Association in 1985 recommended that states investigate procedural reforms designed to address the unique problems presented in child abuse prosecutions.¹⁶ Many states have passed legislation to ease the emotional impact on child witnesses. These reforms include modifications in interviewing procedures, special prosecution units which include a victim advocate for the child, coordination of criminal and juvenile court proceedings, and alternatives to open court testimony such as closed-circuit television, videotaped depositions, and courtroom screens.¹⁷ Additional statutory reforms to facilitate prosecution of abuse cases have included the elimination of competency requirements for child witnesses, the admission of psychological expert testimony, the abolition of corroboration requirements,¹⁸ and special hearsay exceptions.

While these reforms have undoubtedly been helpful in facilitating prosecution of these cases, serious concerns have arisen with respect to their potential infringement on the constitutional rights of the defendant. The Confrontation Clause of the Sixth Amendment to the United States Constitution protects a criminal defendant's right to confront his accusers, a right which may be compromised by some of the reforms made to protect children.¹⁹

14. Goodman, *supra* note 3, at 20 (citing Goodman et al., *The Child in Court: A Preliminary Report on the Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims*, in *THE CHILD WITNESS: DO THE COURTS ABUSE CHILDREN?* (G. Davies & J. Drinkwater eds., 1988)).

15. Goodman, *supra* note 3, at 26-27.

16. Richard Ginkowski, *The Abused Child: The Prosecutor's Terrifying Nightmare*, *CRIM. JUST.*, Spring 1986, at 30, 31.

17. Bulkley, *supra* note 1, at 210.

18. *Id.*

19. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him" *Id.*

Georgia, like many states, has legislated a major reform in this area: the Child Hearsay Statute.²⁰ This Note will examine the Georgia statute as the courts have interpreted it and analyze the statute with respect to Confrontation Clause issues. Part I will discuss evidentiary issues specifically related to the prosecution of child sexual abuse cases. Since Georgia has not adopted the Federal Rules of Evidence, this section will address both the Federal Rules and Georgia evidentiary principles. Part II will analyze current interpretations of the Confrontation Clause, and Part III will analyze the Georgia Child Hearsay Statute in light of Confrontation Clause issues.

I. EVIDENTIARY ISSUES RELATED TO PROSECUTION OF CHILD SEXUAL ABUSE CASES

The unique nature of child sexual abuse prosecutions leaves these cases open to a variety of evidentiary problems. In the majority of cases, there are no witnesses other than the victim and the perpetrator because "people simply do not molest children in front of others."²¹ Molestation typically occurs in the privacy of a place familiar to the child by a person with whom the child has a relationship.²² Because of this familiarity with the child, the perpetrator rarely has to use force, which results in a lack of physical evidence of the assault.²³ Furthermore, assaults other than sexual intercourse with penetration (fondling, exhibitionism, oral sex) do not involve contact that would provide any physical evidence.²⁴

20. O.C.G.A. § 24-3-16 provides:

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.

O.C.G.A. § 24-3-16 (1981 & Supp. 1992).

21. Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1750 (1983) (recounting testimony of social worker from the Sexual Assault Center in Seattle, Washington); see also Kelly, *supra* note 10, at 1024.

22. Kelly, *supra* note 10, at 1023; "A child is 'three times more likely to be molested by a recognized, trusted adult than by a stranger.'" *Id.* at 1023 n.7 (quoting Summit, *supra* note 7, at 182).

23. *Id.* at 1024.

24. Yun, *supra* note 21, at 1749-50.

Without corroborating evidence to support the case, the testimony of the child witness becomes crucial to the prosecution. Yet, because of the child's age, testifying in court may be not only a traumatizing experience for the child, but also a less than valuable tool for the prosecutor.²⁵ The private nature of the crime, coupled with the fact that the child often has a relationship of trust with the accused, exacerbates the undeniably intimidating experience of testifying in a courtroom.²⁶

Furthermore, the child's competency to testify may be questioned.²⁷ Many states, including Georgia, have generally, if not completely, abolished competency requirements for child witnesses in child molestation cases, although the court still retains a general theoretical discretion to exclude testimony of a witness who lacks "minimum credibility."²⁸ Even if competency is not challenged, the credibility of the child's testimony may be questioned because of the child's limited verbal skills. Furthermore, jurors' beliefs about a child's perception and memory abilities, suggestibility, or confusion between fact and fantasy, may also call a child's credibility into question.²⁹

Moreover, many children are so traumatized by the experience of testifying that they cannot do it convincingly; they become tearful and unable to answer questions adequately or even at all, or are totally unresponsive to questions.³⁰ In addition, testifying in the presence of the defendant may increase the child's anxiety to the point where the accuracy and reliability of the testimony are affected.³¹ Thus, a child's in-court testimony is fraught with

25. Goodman, *supra* note 3, at 26-27.

26. Howard, *supra* note 6, at 687-88.

27. Bulkley, *supra* note 1, at 212.

28. *Id.* at 211-12. A recent examination of scientific research on child witnesses concluded that sufficient evidence exists to warrant the conclusion that most children as young as four (and some younger) meet the criteria for competency to testify at trial. NANCY W. PERRY & LAWRENCE S. WRIGHTSMAN, *THE CHILD WITNESS* 257 (1991); see also O.C.G.A. § 24-9-5 (Supp. 1993), and discussion *infra*, upholding the principle.

29. Bulkley, *supra* note 1, at 210. In a study using mock juries, researchers found that adults believe children to be less credible than adult witnesses because of the child's speech style, low status, and lack of self-confidence. Bruce E. Bohlman, *The High Cost of Constitutional Rights in Child Abuse Cases—Is the Price Worth Paying?* 66 N.D. L. REV. 579, 582 (1990) (citing Goodman et al., *When a Child Takes the Stand*, 11 LAW & HUM. BEHAV. 27, 28 (1987)).

30. Goodman, *supra* note 3, at 26.

31. *Id.* at 27. Research studies indicate that anxiety inhibits a child's ability to

potential problems for the prosecutor. For both humane reasons of sensitivity toward the child witness's fragility and practical reasons of desiring to put forward reliable and credible evidence, the prosecution may not want to rely on the child's in-court testimony.

Since the prosecutor's ability to prove the case is usually totally dependent on the testimony of the child, reliance on the child's out-of-court statements made to others is often a virtual necessity.³² Such statements may be in the form of reports disclosed to parents, teachers, friends, or medical personnel.³³ They may also be in the form of videotaped interviews with social workers or police investigators.³⁴ They will often be the first disclosure of the abuse.³⁵ These hearsay declarations of children may take on extreme significance as the most important, if not the only, evidence in the case.

A. *Traditional Approach to Hearsay*

The Federal Rules of Evidence define hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."³⁶ Hearsay includes oral or written statements, as well as nonverbal conduct intended as an assertion.³⁷

1. *Rationale Behind Hearsay Doctrine*

Hearsay is generally not admissible as evidence because of four risks it presents to the evaluation of testimony.³⁸ The first involves the danger that the witness may lack capacity to perceive accurately the event described.³⁹ Second is the risk

testify accurately. Correct identifications are made twice as often when the child does not have to face the defendant. *Id.* (relying on studies reported in Dent, *Stress as a Factor Influencing Person Recognition in Identification Parades*, 30 BULL. OF THE BRIT. PSYCHOL. SOC'Y 339 (1977)).

32. Yun, *supra* note 21, at 1749.

33. JOHN E.B. MYERS, CHILD WITNESS LAW AND PRACTICE 28 (1987).

34. *Id.* at 28-29.

35. See generally Kelly, *supra* note 10, at 1024-26.

36. FED. R. EVID. 801(c).

37. FED. R. EVID. 801(a).

38. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.1, at 681-82 (2d ed. 1986).

39. *Id.* at 682.

that the declarant's memory of the event is inadequate.⁴⁰ A third concern is the risk that the declarant may fail to narrate or articulate clearly.⁴¹ Last is the risk of lack of sincerity in the testimony.⁴²

In-court testimony reduces the dangers presented by these risks because the witness testifies under oath and is subject to cross-examination in the presence of the trier of fact, who can thus judge demeanor.⁴³ Opportunity for cross-examination is widely believed to be the most effective means for exposing inadequacies of perception, memory, narration, and sincerity.⁴⁴

2. *Traditional, "Firmly Rooted" Exceptions to Rule Against Hearsay*

In spite of the general rule against hearsay, exceptions to the rule abound, following from the premise that much evidence not given under the conditions provided by in-trial testimony is nonetheless developed under circumstances that furnish equivalent guarantees of trustworthiness.⁴⁵ In addition, even if in-court testimony is theoretically superior to out-of-court testimony, if hearsay evidence is the only evidence available, then under certain conditions it is considered better than none at all.⁴⁶

The Federal Rules of Evidence, which codify what are often referred to as firmly rooted common law hearsay exceptions, contain twenty-three exceptions for specific types of hearsay declarations that are accepted as possessing "circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant at the trial even though he may be available."⁴⁷

40. *Id.*

41. *Id.*

42. *Id.* at 681-82.

43. FED. R. EVID. art. VIII advisory committee's introductory note.

44. *Id.* The advisory committee notes that while "[a]ll may not agree with Wigmore that cross-examination is 'beyond doubt the greatest legal engine ever invented for the discovery of truth,' . . . all will agree . . . that it has become a 'vital feature' of the Anglo-American system." *Id.* (quoting 5 WIGMORE § 1367, 29).

45. *Id.* "Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is." *Id.*

46. *Id.* "[W]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without." *Id.*

47. FED. R. EVID. 803 advisory committee's notes.

Of these, several are potentially applicable to children's evidentiary statements in child abuse prosecutions.

Rule 803(1), which exempts statements of present sense impressions from the rule against hearsay,⁴⁸ may occasionally be used. However, the rule's use is limited because it requires virtual contemporaneity, and it is rare that a child makes immediate disclosure.⁴⁹

Rule 803(2), which provides an exception for an excited utterance,⁵⁰ allows for more time to elapse, as long as the statement is assured of spontaneity rather than deliberation.⁵¹ However, a statement made in response to questioning eight hours after the event would probably not qualify under this exception.⁵²

Rule 803(4), which provides an exception for statements made for purposes of medical diagnosis or treatment, may be useful for hearsay statements made to medical personnel and is often employed.⁵³ In fact, the trend of courts has been toward broadening use of this rule to admit statements identifying the perpetrator on the basis that diagnosis and treatment of psychological problems often depend on the identity of the abuser.⁵⁴ However, that use has been criticized as a distortion of the rule.⁵⁵ Use of the rule with statements of young children in general has been questioned on the theory that a child is not necessarily aware of the importance of telling the truth in order

48. FED. R. EVID. 803(1): "Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

49. Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 526 (1988).

50. FED. R. EVID. 803(2): "Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

51. FED. R. EVID. 803(1), 803(2) advisory committee's notes.

52. Graham, *supra* note 49, at 527.

53. FED. R. EVID. 803(4): "Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or . . . general character of the cause . . . thereof insofar as reasonably pertinent to diagnosis or treatment."

54. Graham, *supra* note 49, at 529.

55. *Id.* at 529 n.26 (citing *United States v. Renville*, 779 F.2d 430, 436-37 (8th Cir. 1985)).

to obtain an accurate medical diagnosis or treatment, which is the rationale behind the exception.⁵⁶

Additionally, a residual hearsay exception, Rule 803(24), is available for statements that are both necessary as the best probative evidence reasonably procurable, and equivalently trustworthy to the traditional hearsay exceptions.⁵⁷ Trustworthiness is evaluated by numerous criteria: the credibility of the statement and the declarant in light of the declarant's personal knowledge at the time; the availability of time to fabricate; the declarant's bias; the suggestiveness of others, particularly authority figures; corroborating factors; the appropriateness of the terminology of the statement with respect to the child's age; and the age, maturity, and physical and mental condition of the child.⁵⁸ In addition, the reliability of the statement may be influenced by the form of the disclosure (i.e., whether it was spontaneous or in response to questioning); the firmness with which a child disagrees or corrects a questioner to suggest certainty of the child's beliefs; and the length of time between the event and the child's description of it, particularly in light of any intervening factors that might have interfered with or tainted the child's memory.⁵⁹

In Rule 804, the Federal Rules of Evidence provide five additional exceptions to the rule against hearsay which are applicable only if the declarant is unavailable to testify.⁶⁰ The essential factor in determining unavailability relates to the

56. *Id.* at 528.

57. FED. R. EVID. 803(24) provides:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 803(24). This rule requires advance notice to the adverse party for a fair opportunity to prepare to meet it. *Id.*

58. Graham, *supra* note 49, at 531-32.

59. MYERS, *supra* note 33, at 217-23 (Supp. 1992).

60. FED. R. EVID. 804. Rule 804(a) defines "unavailability" to include situations where a declarant is privileged from testifying, refuses to testify or testifies to lack of memory, is unable to testify because of death or disability, or is absent and the proponent of the statement has been unable to procure the declarant's attendance through process or other reasonable means. *Id.*

witness's testimony rather than to the declarant's physical presence.⁶¹ Unavailability in the context of child witnesses would typically include incompetency (though rarely invoked),⁶² the statutory grounds of persistent refusal to testify, and lack of memory that might result from the trauma of open-court appearance.⁶³ In addition, some states allow an unavailability determination based on a showing of the potential emotional distress a child victim might experience from testifying in court.⁶⁴

The rationale behind the Rule 804 exceptions differs from that regarding Rule 803.⁶⁵ Rule 804 implies a preference for in person testimony given on the stand.⁶⁶ However, the rule recognizes that out-of-court statements that are not of equal quality to in-court testimony, but that meet certain specified standards, are preferable to a complete loss of the evidence.⁶⁷

When a witness's testimony is determined to be unavailable, Rule 804 allows, among other things, admission of former testimony.⁶⁸ In child sexual abuse prosecutions, this former testimony will often be in the form of videotaped depositions or testimony from preliminary or other hearings.⁶⁹ Rule 804 also contains a residual clause identical to 803(24).⁷⁰

B. Georgia Evidentiary Rules

Georgia has not adopted the Federal Rules of Evidence, but rather has a hodge-podge of rules found in the state constitution, statutes, case law, and court rules.⁷¹ The Official Code of

61. Graham, *supra* note 49, at 554.

62. *Id.* at 556. Since mere "minimum credibility" is the standard set by FED. R. EVID. 601, courts tend to allow questionably incompetent testimony so that the jury can judge the witness's credibility. *Id.* at 556 n.179.

63. *Id.* at 557.

64. *Id.* at 558-59 (discussing several state statutes that provide for such an inclusion in the definition of "unavailability").

65. FED. R. EVID. Rule 804 advisory committee's notes.

66. *Id.*

67. FED. R. EVID. Rule 804(b) advisory committee's notes.

68. FED. R. EVID. 804(b). The rule also provides for statements under belief of impending death, statements against interest, and statements of personal or family history, and includes a residual exception, 804(b)(5), identical to 803(24) for other statements not specifically covered. *Id.*; see *supra* notes 57-58 and accompanying text for analysis of the residual exception clauses.

69. Graham, *supra* note 49, at 561.

70. FED. R. EVID. 804(5); see *supra* note 57.

71. GREEN, GEORGIA LAW OF EVIDENCE 4 (3d ed. 1988 & Supp. 1992).

Georgia Annotated defines hearsay as evidence “which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons.”⁷² Hearsay “is admitted only in specified cases from necessity.”⁷³ Regardless of the difference in definitions between the declarant-oriented Georgia rule and the assertion-oriented federal rule, hearsay analysis under Georgia law has been substantively similar to that under federal law.⁷⁴

One major difference relevant to the analysis of this Note, however, is that out-of-court statements of a witness present and available for cross-examination do not fall within the Georgia definition and are thus admissible.⁷⁵ A second difference is that Georgia does not recognize hearsay within hearsay.⁷⁶ A third difference, with respect to the definition of unavailability, is analyzed *infra* with discussion of the exceptions requiring it.

Like federal law, Georgia law has numerous exceptions to the general rule not allowing hearsay, and like federal law, these exceptions are based on necessity and circumstantial guarantees of the statement's trustworthiness when made.⁷⁷ The most significant of these exceptions potentially applicable to evidentiary statements in child abuse cases is the exception for evidence considered to be part of the *res gestae*,⁷⁸ a broad term encompassing “the entirety of the transaction or occurrence being investigated, and every part of it.” Admissibility of statements closely connected with the *res gestae* are deemed reliable as spontaneous declarations.⁷⁹

Included as part of the *res gestae* are declarations such as the excited utterance, interpreted in Georgia substantially the same as in Federal Rule 803(2),⁸⁰ relying on the genuineness and

72. O.C.G.A. § 24-3-1(a) (1988 & Supp. 1992).

73. *Id.* § 24-3-1(b) (1981 & Supp. 1992).

74. Marc T. Treadwell, *Annual Survey of Georgia Law*, June 1, 1987-May 31, 1988: Evidence, 40 MERCER L. REV. 225, 253 (1988).

75. WILLIAM B. AGNOR, AGNOR'S GEORGIA EVIDENCE § 11 (2d ed. 1986 & Supp. 1991) (citing *Shelton v. Long*, 339 S.E.2d 788 (Ga. 1986)).

76. *Id.* § 11-5.

77. *Id.* § 11-47 (Supp. 1991) (citing *Swain v. C&S Bank of Albany*, 372 S.E.2d 423 (Ga. 1988)).

78. O.C.G.A. § 24-3-3 (1981 & Supp. 1991) states: “Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the *res gestae*.”

79. GREEN, *supra* note 71, at 452.

80. See *supra* note 50 and accompanying text.

sincerity of the utterance by virtue of its being evoked by a startling event.⁸¹ Like the federal rule, this exception has been construed to incorporate a flexible time-frame within which the statement is considered "free of device and afterthought."⁸² Statements of present sense impressions, similar to Federal Rule 803(1),⁸³ also have been found to fall within the general *res gestae* in practice, but Georgia has not officially recognized the exception.⁸⁴ In addition, the Georgia *res gestae* exception includes declarations of "physical feelings, pain, and suffering,"⁸⁵ and accordingly, a "medical diagnosis and treatment" exception, almost identical to Federal Rule 803(4), has been adopted.⁸⁶ Georgia has restricted this exception to exclude statements about the identity of the perpetrator of the abuse on the basis that this is not pertinent to medical diagnosis.⁸⁷

As the definition of hearsay states, hearsay is admitted based on necessity.⁸⁸ A generalized "necessity exception" similar to Federal Rule 804(5) is found in case law for use when the declarant is inaccessible and the statement has circumstantial guarantees of trustworthiness when made.⁸⁹ Georgia's "inaccessibility" standard is narrower than the federal standard of unavailability, seemingly requiring that the declarant either be dead or privileged.⁹⁰ Thus, this exception would rarely be of use in child abuse prosecutions.

C. *Child Hearsay Statutes*

In response to the inherent limitations involved in the use of traditional exceptions for children's hearsay declarations, thirty-one states have enacted legislation to permit admissibility of

81. GREEN, *supra* note 71, at 458-59.

82. *Id.* at 26 (Supp. 1991) (citing *Ward v. State*, 386 S.E.2d 139 (Ga. 1988)).

83. *See supra* note 48 and accompanying text.

84. GREEN, *supra* note 71, at 460.

85. *Id.* at 480.

86. O.C.G.A. § 24-3-4 (1981 & Supp. 1991): "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admissible in evidence." *See also supra* notes 53-57 and accompanying text.

87. *Roberson v. State*, 370 S.E.2d 661, 662 (Ga. 1988).

88. O.C.G.A. § 24-3-1 (1981 & Supp. 1991).

89. *Swain v. C&S Bank of Albany*, 372 S.E.2d 423 (Ga. 1988).

90. Compare AGNOR, *supra* note 75, at 88-89 (Supp. 1991) with FED. R. EVID. 803(24), 804(5); *see also supra* notes 60-70.

hearsay statements of child victims of sexual abuse.⁹¹ Based on the principles underlying traditional hearsay exceptions, trustworthiness and necessity, these statutes typically require a finding of sufficient indicia of reliability and circumstantial guarantees of trustworthiness equivalent to those required by the residual clauses of Federal Rules 803(24) and 804(5).⁹² Many of the statutes require this determination to be made outside the presence of the jury to insure that "jurors are not exposed to inadmissible and potentially prejudicial hearsay."⁹³ Most of the statutes additionally require that the child testify at trial or be shown to be unavailable.⁹⁴

As with all hearsay, the underlying principles of trustworthiness and necessity are the foundations of child hearsay statutes.⁹⁵ The unique nature of child sexual abuse prosecutions generally provides a sufficient basis for necessity.⁹⁶ The definition of necessity in Rules 803(24) and 804(5) requires "the best probative evidence reasonably procurable."⁹⁷ Accordingly, if the child cannot testify, the need is met. Even if the child can testify, a statement made closer to the time of the event, if reliable, would arguably be better probative evidence than in-court recital of the event.⁹⁸ Furthermore, if the child is traumatized to the point that testifying will debilitate the

91. NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, LEGISLATION REGARDING STATUTORY HEARSAY EXCEPTIONS FOR CRIMINAL CHILD ABUSE CASES (1992).

92. Graham, *supra* note 49, at 534-35; see discussion, *supra* notes 58-59 and accompanying text regarding indicia of reliability.

93. MYERS, *supra* note 33, at 374.

94. Kelly, *supra* note 10, at 1037-38. Several states require corroboration of the act that is the subject of the out-of-court statement, if the child does not testify. *Id.* Others require notice to the opposing party. *Id.* at 1038-39. The Georgia statute requires that the child be available. O.C.G.A. § 24-3-16 (Supp. 1993); see *infra* Part III for detailed discussion of the Georgia Child Hearsay Statute.

95. Yun, *supra* note 21, at 1747.

96. See *supra* notes 20-31 and accompanying text.

97. FED. R. EVID. 803(24) and 804(5), *supra* note 57.

98. Yun, *supra* note 21, at 1750. Although Yun relies on research suggesting that children possess inferior memory to adults, these findings are controversial. *Id.* Current research is skeptical of previous results as being too simplistic. *Id.* While recent studies agree that spontaneous free recall memory of very young children is more limited, by the time a child reaches twelve, free recall memory is the same as an adult's. *Id.* Furthermore, the information young children do recall, or that can be elicited through questioning to stimulate memory, is as accurate as an adult's. MYERS, *supra* note 33, at 10 (Supp. 1992). See generally CHILDREN'S EYEWITNESS MEMORY, (Stephen J. Ceci et al., eds., 1987).

evidence given,⁹⁹ the "best probative evidence" rationale is even stronger.

Thus, the substantive inquiry focuses on trustworthiness. Child hearsay exceptions, like the residual exceptions, are not considered to be traditional, firmly rooted exceptions in which sufficient trustworthiness is inferred without further inquiry.¹⁰⁰ Two sources control the determination of reliability: the guidelines in Rules 803(24) and 804(b)(5), and the current Supreme Court interpretation of the requirements of the Confrontation Clause.¹⁰¹ Although in the past the Confrontation Clause was thought to be implicated in hearsay questions only when the declarant did not testify and was therefore not available for cross-examination, recent cases support the conclusion that the reliability analysis of hearsay statements is not limited to these situations.¹⁰²

II. THE CONFRONTATION CLAUSE IN THE CONTEXT OF CHILD SEXUAL ABUSE PROSECUTIONS

Despite the acceptance of the broad reaches of hearsay exceptions, their applicability in criminal cases is constricted by the constitutional requirements of the Confrontation Clause when protection of the criminal defendant's rights is threatened.¹⁰³ The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . ."¹⁰⁴ In 1965, the Sixth Amendment right was extended to the states through the Fourteenth Amendment.¹⁰⁵ For the purposes of Confrontation Clause analysis, an absent declarant "is undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial."¹⁰⁶

99. See *supra* notes 13-14, 25-29 and accompanying text.

100. MYERS, *supra* note 33, at 375; Idaho v. Wright, 497 U.S. 805 (1990); State v. Robinson, 722 P.2d 1379, 1385 (Wash. Ct. App. 1986).

101. MYERS, *supra* note 33, at 375.

102. Younts, *supra* note 4, at 6-7 (citing recent Supreme Court decisions in Idaho v. Wright, 497 U.S. at 818 and White v. Illinois, 112 S. Ct. 736, 741-42 (1992)).

103. MYERS, *supra* note 33, at 307.

104. U.S. CONST. amend. VI.

105. Pointer v. Texas, 380 U.S. 400 (1965).

106. Maryland v. Craig, 497 U.S. 836, 849 (1990).

Courts and commentators agree that little is known conclusively about the Framers' original intentions in drafting the Confrontation Clause.¹⁰⁷ Early interpretation of the purpose of the clause focused on its assuring direct and cross-examination in front of a jury so that the jury could assess the demeanor, and thus the credibility, of the witness.¹⁰⁸

However, interpretations over the last twenty years reflect a changed focus.¹⁰⁹ The Court now considers the primary purpose to be to "advance 'the accuracy of the truth-determining process in criminal trials' " by requiring that evidence admitted in such cases be reliable.¹¹⁰ Hence, the right to face-to-face confrontation and cross-examination of witnesses is no longer the core purpose but rather is "primarily a functional right that promotes reliability in criminal trials."¹¹¹

A. *Elements of Confrontation*

The right of confrontation guaranteed by the Sixth Amendment consists of four elements: (1) face-to-face contact between the accused and accuser; (2) opportunity for cross-examination of the witness; (3) witness testimony given under oath, to impress upon the witness the seriousness of the matter and warn against perjury; and (4) opportunity for the jury to observe the demeanor of the witness in order to assess credibility.¹¹² The United States Supreme Court has suggested in dicta that none of the rights conferred by the Confrontation Clause is absolute if challenged by the necessity to further an important public policy.¹¹³ Rather, it is the "combined effect" of these elements of confrontation that ensures that evidence admitted is "reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings."¹¹⁴ This theory is

107. Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 578 (1988); see also *id.* at 569 n.46.

108. *Id.* at 578 (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

109. *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)).

110. *Id.*

111. Jonakait, *supra* note 107, at 576 n.62 (citing *Lee v. Illinois*, 476 U.S. 530, 540 (1986)).

112. 497 U.S. at 846 (citing *Green v. California*, 399 U.S. 149 (1970)).

113. *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (ruling that the placing of a screen between the child victim/witness and the defendant, "without more than [a] type of generalized finding," violated the right of face-to-face confrontation).

114. *Maryland v. Craig*, 497 U.S. at 845.

consistent with the subjection of other Sixth Amendment rights to interpretation "in the context of the necessities of trial and the adversary process."¹¹⁵

Although the "irreducible literal meaning of the Clause [guarantees] 'a right to meet face-to-face all those who appear and give evidence at trial,' "¹¹⁶ the Court has never held this to be an absolute right.¹¹⁷ In fact, the Court has specifically said that even though face-to-face confrontation forms the "core of values furthered by the Confrontation Clause, it is not the *sine quo non* of the confrontation right."¹¹⁸ Thus, although the Confrontation Clause "reflects a preference for face-to-face confrontation at trial,"¹¹⁹ this preference, though not easily dispensed with, may occasionally have to give way in order to further an important public policy as long as the reliability of the testimony is otherwise assured.¹²⁰ In *Maryland v. Craig*,¹²¹ the Court recognized that "protection of minor victims of sex crimes from further trauma and embarrassment" is a compelling state interest¹²² and, with an adequate finding of necessity, it is sufficiently important to justify permitting the child witness to testify without face-to-face confrontation with the defendant via a one-way closed-circuit television.¹²³

The Court was careful to note that this confrontation right may not be eliminated easily. The other elements of confrontation, testifying under oath, cross-examination, and ability to view demeanor, were present to ensure reliability and

115. *Id.* at 850 (citing numerous instances of this type of interpretation of rights: *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (right to be present at trial not violated by judge's removal of defendant for disruptive behavior); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-54 (1987) (plurality opinion) (right to cross-examination not violated where defendant denied access to investigative files); *Taylor v. United States*, 484 U.S. 400, 410-16 (1988) (right to compulsory process not violated where judge precluded surprise defense witness from testifying at trial); *Perry v. Leake*, 488 U.S. 272, 280-85 (1989) (right to effective assistance of counsel not violated where judge prevented testifying defendant from conferring with counsel during short break)).

116. *Coy v. Iowa*, 487 U.S. at 1021 (quoting *Green v. California*, 399 U.S. at 175 (original altered)).

117. *Maryland v. Craig*, 497 U.S. at 844.

118. *Id.* at 847 (quoting *Green v. California*, 399 U.S. at 157).

119. *Id.* at 849 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

120. *Id.* at 848-49; see also *Coy v. Iowa*, 487 U.S. at 1021.

121. 497 U.S. 836 (1990).

122. *Id.* at 852 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

123. *Id.* at 857.

rigorous adversarial testing.¹²⁴ Furthermore, the requisite finding of necessity must be case-specific and based on evidence that the child would be traumatized to “more than [a] *de minimus*” degree by the presence of the defendant.¹²⁵ The Court refused to define a minimum standard, but held that the showing required by the Maryland statute in question, “serious emotional distress such that the child cannot reasonably communicate,” clearly sufficed.¹²⁶ The Court also declined to provide evidentiary standards for the determination of necessity.¹²⁷ However, it did find that the showing could be based on expert testimony alone, as long as it was specific to the child.¹²⁸

The opportunity for cross-examination stands out as the primary requirement of the Confrontation Clause and is recognized as a critical means of testing the credibility of a witness and the truthfulness of testimony.¹²⁹ Nevertheless, the many accepted exceptions to the rule against hearsay attest to the fact that even this requirement is not absolute.¹³⁰ Certainly, contemporaneous cross-examination is not required with respect to hearsay statements.¹³¹ In addition, productive cross-examination is not required: the Confrontation Clause “includes no guarantee that every witness . . . will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion [and] . . . is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination.”¹³² Thus, unproductive cross-examination seems to satisfy the clause as long as the opportunity is available.¹³³

124. *Id.* at 850.

125. *Id.* at 856.

126. *Id.* at 855 n.1 (quoting Md. Code Ann., Cts. & Jud. Proc. § 9-102(a)(1)(ii) (1989)).

127. *Id.* at 860.

128. *Id.*

129. *Kentucky v. Stincer*, 482 U.S. 730, 734 (1987); *Tennessee v. Street*, 471 U.S. 409, 414 (1985) (describing the Confrontation Clause’s fundamental role as the protection of the right of cross-examination); see *Ohio v. Roberts*, 448 U.S. 56, 69 (1980) (noting that oath, cross-examination and demeanor provide “all that the Sixth Amendment demands: ‘substantial compliance with the purposes behind the confrontation requirement’ ” (quoting *Green v. California*, 399 U.S. at 166)).

130. *Maryland v. Craig*, 497 U.S. at 847.

131. *Ohio v. Roberts*, 448 U.S. at 73.

132. *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985).

133. *Id.*

The element of requiring testimony under oath has not received much attention in Confrontation Clause analysis.¹³⁴ As is the case with respect to evaluation of testimony related to hearsay issues, taking an oath is considered secondary to the assurance that testimony was given with an understanding of the importance of telling the truth.¹³⁵

The same general concern with assurance of reliability is present in the fourth element of confrontation, allowing the jury to observe demeanor and judge credibility.¹³⁶ This element's importance lies in testing accuracy by "compelling [the witness] to stand face to face with the jury in order that they may . . . judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."¹³⁷ Standing alone, this element has received little attention and is better addressed as part of the overall issue of unavailability.¹³⁸ The element has independent importance, however, where the witness is present but unresponsive to cross-examination, as discussed *infra*.

B. The Impact of the Confrontation Clause on the Admissibility of Hearsay

The relationship between hearsay and the Confrontation Clause is complex because the law has developed continuously during the past twenty years,¹³⁹ particularly in response to the increased use of various forms of hearsay and alternative forms of children's testimony in child sexual abuse prosecutions.¹⁴⁰ Recent decisions have provided some clarification. Most recently, the Supreme Court in *White v. Illinois*¹⁴¹ reaffirmed previous holdings that "hearsay rules and the Confrontation Clause are generally designed to protect similar values."¹⁴² Nevertheless, the Court reiterated that it would continue "not to equate the

134. See MYERS, *supra* note 33, at 100-01; see also FED. R. EVID. art. VIII advisory committee's introductory notes.

135. MYERS, *supra* note 33, at 101-02.

136. *Id.* at 302.

137. *Ohio v. Roberts*, 448 U.S. at 64 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

138. *Id.*; see also FED. R. EVID. art. VIII advisory committee's introductory notes.

139. MYERS, *supra* note 33, at 298.

140. Graham, *supra* note 49, at 523-24.

141. *White v. Illinois*, 112 S. Ct. 736 (1992).

142. *Id.* at 741 (quoting *Green v. California*, 399 U.S. 149, 155 (1970)).

Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements."¹⁴³

In *White*, the Court, in dicta, also rejected an argument presented by the United States as amicus curiae that the Confrontation Clause's limited purpose is to prevent prosecution through ex parte affidavits without producing the affiants at trial, an abuse of authority popular in 16th and 17th century England.¹⁴⁴ The logical extension of this argument would be that the Confrontation Clause restrictions apply only to those out-of-court statements made for the principal purpose of accusing the defendant and used where the declarant is unavailable for cross-examination.¹⁴⁵ Other out-of-court statements admitted under accepted hearsay exceptions would not be subject to a constitutional analysis.¹⁴⁶ In rejecting such a narrow reading of the Confrontation Clause, the Court upheld the notion that the clause does have a role in restricting the admission of some hearsay.¹⁴⁷

In fact, the Court has recognized that important public policies, such as the state's interest in effective law enforcement, may compete with the rights embodied in the Confrontation Clause.¹⁴⁸ The addition of a second important public policy of protecting children would undoubtedly strengthen state interests in the balancing process.¹⁴⁹ The Court has sought to accommodate these conflicting interests and to uphold the purpose of the clause which is to "augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence, [by allowing that the] Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'"¹⁵⁰

143. *Id.* (quoting *Idaho v. Wright*, 497 U.S. 805, 814 (1990)).

144. *Id.* at 741 n.5.

145. *Id.* at 740.

146. *Id.* at 740-41.

147. *Id.* Justice Thomas, joined by Justice Scalia, wrote a concurrence in which he voiced support for the government's narrower reading of the Confrontation Clause as both being consistent with the Court's earlier line of cases and simplifying the hearsay issue. *Id.* at 747-48 (Thomas, J., concurring). The majority reiterated, however, that the position had been previously advanced and rejected. *Id.* at 741 n.5 (citing *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

148. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

149. MYERS, *supra* note 33, at 307.

150. *Ohio v. Roberts*, 448 U.S. at 65 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

Thus, the hearsay rule, acting to reduce the four risks inherent in hearsay,¹⁵¹ and the Confrontation Clause, operating to afford criminal defendants the right to confront and cross-examine witnesses in court, work together to promote reliability in the fact-finding process.¹⁵² They accomplish this goal by excluding various types of hearsay that have been proven to be unreliable and by encouraging in-court confrontational testimony.¹⁵³

Generally, hearsay statements of declarants who appear at trial and are subject to cross-examination present no confrontation issues.¹⁵⁴ However, when the hearsay declarant is not present at trial or is otherwise unavailable, the Confrontation Clause's preference for in-court confrontational testimony is absent.¹⁵⁵ It is significant that the Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."¹⁵⁶

As initially established in *Ohio v. Roberts*,¹⁵⁷ determination of the admissibility of hearsay under the Confrontation Clause required a two fold analysis.¹⁵⁸ First, the proponent of the hearsay must either produce or show the declarant's unavailability.¹⁵⁹ Second, the hearsay must bear adequate indicia of reliability.¹⁶⁰ These two requirements have developed separately.

1. Unavailability

The unavailability rule "require[s] as a predicate for introducing hearsay testimony either a showing of the declarant's unavailability or production at trial of the declarant."¹⁶¹ The

151. See *supra* notes 38-44 and accompanying text.

152. MYERS, *supra* note 33, at 299-300; *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

153. MYERS, *supra* note 33, at 300.

154. *Id.* at 304.

155. *Id.*

156. *U.S. v. Owens*, 108 U.S. 838, 842 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985))). *Owens* held that the Confrontation Clause was not violated by admission of a witness's identification who had a memory loss and was thereby unable to testify to the basis for the identification. *Id.* at 845.

157. *Ohio v. Roberts*, 448 U.S. 56 (1980).

158. *Id.* at 65.

159. *Id.*

160. *Id.*

161. *White v. Illinois*, 112 S. Ct. 736, 742 n.6 (1992).

finding of unavailability is based on the same inquiry for hearsay exceptions under Federal Rule 804(a)¹⁶² with the additional requirement that the prosecutor show that a good-faith effort, reasonable under the circumstances, has been made to present the declarant at trial.¹⁶³ The rule first appeared with respect to the introduction of prior testimony from a preliminary hearing,¹⁶⁴ and since that time, it arguably has been limited to out-of-court statements made in prior judicial proceedings.¹⁶⁵

The unavailability rule specifically does not apply to co-conspirator statements,¹⁶⁶ or to statements offered under "excited utterance," "procurement of medical services," or other firmly rooted hearsay exceptions.¹⁶⁷ The rationale lies in the fact that these types of statements are made in contexts that inherently provide substantial guarantees of trustworthiness, and because of these very contexts, the same reliability cannot be recaptured by later in-court testimony.¹⁶⁸ Furthermore, there is little benefit in imposing the rule when a firmly rooted hearsay exception is, by definition, "so trustworthy that adversarial testing can be expected to add little to its reliability."¹⁶⁹ In contrast, prior statements made in judicial proceedings will lose no evidentiary value if they are replaced with live testimony. Moreover, they may gain reliability through the cross-examination process.¹⁷⁰

Thus, it is clear that, regardless of availability or unavailability of declarants, hearsay that has sufficient guarantees of reliability to come within firmly rooted hearsay exceptions satisfies the Confrontation Clause.¹⁷¹ However, because the Court did not reach the unavailability issue in the recent case of *Idaho v. Wright*,¹⁷² it is unclear whether the unavailability analysis applies to hearsay proffered through residual hearsay or other statutory clauses.¹⁷³ Presumably, the

162. See *supra* notes 60-64 and accompanying text.

163. *Ohio v. Roberts*, 448 U.S. at 74.

164. See generally *id.* at 68-70.

165. 112 S. Ct. at 741.

166. *United States v. Inadi*, 475 U.S. 387, 392 (1986).

167. 112 S. Ct. at 743.

168. *Id.* at 742.

169. *Idaho v. Wright*, 497 U.S. 805, 821 (1990).

170. 112 S. Ct. at 743.

171. *Id.*

172. 497 U.S. at 816.

173. *Id.*

rationale would not apply, as these exceptions are not considered to be traditional, firmly rooted exceptions.¹⁷⁴ However, since the Court more recently in *White* did make the point that "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding,"¹⁷⁵ the door is left open for argument.

2. *Indicia of Reliability*

The second prong of the test established in *Roberts* has not gone through such significant changes. Hearsay within firmly rooted exceptions has sufficient guarantees of reliability to satisfy the Confrontation Clause.¹⁷⁶ These guarantees are presumed to result from the fact that hearsay exceptions possess "the imprimatur of judicial and legislative experience" in assessing trustworthiness.¹⁷⁷ Presumably, the exceptions recognized in Rule 803 of the Federal Rules of Evidence would qualify as "firmly rooted" exceptions, since the rationale behind them is that they possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant.¹⁷⁸ The Court has also included statements of co-conspirators as firmly rooted exceptions.¹⁷⁹ As noted *supra*, the Court has additionally specifically included the exceptions for excited utterance and medical diagnosis or treatment, noting that they are recognized under the Federal Rules of Evidence and are widely accepted among the states.¹⁸⁰ However, the Court has refused to list categorically those exceptions that would qualify.

Ironically, the recent holding in *White v. Illinois*, recognizing the medical diagnosis or treatment exception, may prove to be troublesome.¹⁸¹ Although statements to professionals providing medical treatment have long been admitted under this exception, "when the professional is a psychiatrist, psychologist, or social worker providing psychotherapy, it is more difficult to argue that

174. *Id.*

175. 112 S. Ct. at 741.

176. *Id.* at 743. This holding was originally stated in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

177. 497 U.S. at 817 (citation omitted).

178. FED. R. EVID. 803 advisory committee's notes.

179. *Bourjaily v. United States*, 483 U.S. 171 (1987).

180. 112 S. Ct. at 742 n.8.

181. MYERS, *supra* note 33, at 179 (Supp. 1992).

statements to such professionals are within a firmly rooted exception."¹⁸² Likewise, the common law medical treatment exception did not include statements of fault; this aspect of the Federal Rules was added when the rules were enacted in 1975.¹⁸³ Although the current trend of courts is to admit identifying statements, particularly regarding child abuse perpetrators, it is arguable—and persuasively so—that such statements are not firmly rooted and thus require a particularized showing of reliability.¹⁸⁴

Hearsay not within a firmly rooted exception is “presumptively unreliable” and is inadmissible unless rebutted by a showing of “particular guarantees of trustworthiness.”¹⁸⁵ This standard applies to hearsay proffered under residual exceptions as well as under other non-firmly rooted statutory exceptions, which would undoubtedly include child hearsay exceptions.¹⁸⁶

Particularized guarantees of trustworthiness must be determined by a consideration of the totality of the circumstances at the time the statement was made.¹⁸⁷ In *Idaho v. Wright*,¹⁸⁸ the Court listed some factors it considered relevant to the determination of whether children in sexual abuse cases were particularly likely to be telling the truth when the statement was made and thus meet Confrontation Clause standards. These factors include, but are not limited to: spontaneity and consistent repetition, mental state of the declarant, use of age-inappropriate terminology, and lack of motive to fabricate.¹⁸⁹ Reinforcing the necessity to evaluate the circumstances at the time the statement was made, the Court specifically rejected a per se bar to admission of prior statements on grounds that the declarant was

182. *Id.*

183. FED. R. EVID. 803(4) provides: “Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms . . . or the general character of the cause . . . thereof” *See also* FED. R. EVID. 803(4) advisory committee’s notes.

184. MYERS, *supra* note 33, at 179-80 (Supp. 1992) (citing *Nelson v. Farrey*, 874 F.2d 1222, 1233 (7th Cir. 1989)).

185. 497 U.S. at 818 (1990); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

186. 497 U.S. at 817-18. If hearsay admitted under “residual exceptions automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take.” *Id.*

187. *Id.* at 819.

188. *Id.* at 805.

189. *Id.* at 821-22; *see also supra* notes 58-59 and accompanying text.

later found incompetent to testify at trial, recognizing that the fact might or might not be relevant to whether the prior statement was reliable.¹⁹⁰

Other evidence corroborating the statement may not be considered in evaluating the hearsay: "[h]earsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."¹⁹¹ Otherwise, the jury might rely on such corroboration to infer trustworthiness of the statement.¹⁹²

While the Court has not set specific procedural guidelines,¹⁹³ the finding of reliability must be as certain as the trustworthiness of a firmly rooted hearsay exception (i.e., so trustworthy that adversarial testing would add little to its reliability).¹⁹⁴ The holding in *Wright* has strong implications for courts to look closely into the underlying validity of investigative interviews and expert testimony as well as statements made to lay people.¹⁹⁵

C. Conclusions

From the holdings of *White* and *Wright*, it appears that hearsay inadmissible under the Confrontation Clause is also not admissible as hearsay in general, since the requisite finding of indicia of reliability is virtually the same.¹⁹⁶ These cases also seem to practically eliminate any consideration of the unavailability rule.

White clearly eliminated the necessity for consideration of firmly rooted hearsay exceptions on the ground that a statement admitted through them was, by definition, so trustworthy that adversarial testing would add little to its reliability.¹⁹⁷ The Court in *White* also stated in dicta that the unavailability

190. *Id.* at 825.

191. *Id.* at 822-23 ("Presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless, rather than that any basis exists for presuming the declarant to be trustworthy.").

192. *Id.* at 823.

193. *Id.* at 818 (rejecting any fixed set of procedural requirements, such as videotaping interviews or prohibiting the use of leading questions, saying that in some cases such procedures may be inappropriate or unnecessary, while in others they might enhance the reliability).

194. *Id.* at 821.

195. Younts, *supra* note 4, at 696-97.

196. *Id.* at 702.

197. *White v. Illinois*, 112 S. Ct. 736, 743 (1992).

analysis was applicable only to statements made in prior judicial proceedings.¹⁹⁸ *Wright* defined constitutional admissibility standards of other hearsay declarations only as “so trustworthy that adversarial testing would add little to [their] reliability,” and ignored the second requirement of unavailability. In doing so, the Court suggests elimination of the relevance of the unavailability rule to residual and other statutory hearsay exceptions.¹⁹⁹ Yet, an earlier paragraph in the decision arguably prohibits this conclusion: “[W]ere we to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take.”²⁰⁰

The major criticism of the standards established by these recent Supreme Court cases focuses on their reliance on the “inherent reliability” of firmly rooted hearsay exceptions.²⁰¹ Contrary to the contention that these rules have been developed through rational and empirical thought, historical analysis reflects that they come from courts’ continuing the “hearsay rituals of their ancestors: find a case, cite a case, stretch a case.”²⁰² In fact, many of the accepted exceptions, such as the “excited utterance” exception, have questionable empirical support for enhanced reliability free of hearsay risks: on the one hand, such declarations are supposed to be so spontaneous that they are free of potential fabrication; on the other hand, critics have pointed out that excitement can likewise increase misperception and miscommunication.²⁰³ Yet, in the *White* decision, the “excited utterance” exception was one of the prime examples of “firmly rooted exceptions carry[ing] sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause.”²⁰⁴

198. *Id.* at 741.

199. See generally *Idaho v. Wright*, 497 U.S. 805 (1990).

200. *Id.* at 817-18.

201. See Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723 (1992).

202. *Id.* at 759. Professor Milich is concerned over the fact that although most hearsay exceptions began with analysis regarding trustworthiness, necessity, and fairness based on the facts of a particular case, the decisions were then distilled into generalized rules that do not continue to possess the same reliability. *Id.* at 749.

203. *Id.* at 760.

204. *White v. Illinois*, 112 S. Ct. at 742.

Furthermore, the Court has begun to characterize the firmly rooted exceptions as being "so trustworthy that adversarial testing can be expected to add little to [their] reliability."²⁰⁵ This presumption of the Court that increased reliability of a statement decreases the potential benefits of cross-examination and ignores the multiple purposes of cross-examination.²⁰⁶ At trial, there is clearly more potential benefit in cross-examining a reliable hearsay statement that proves a critical issue than there is in questioning a less reliable statement that speaks to a minor point.²⁰⁷ Thus, the Court's recent reliance on firmly rooted exceptions as a proxy for reliability determination stands on unstable foundations and suggests a questioning of what is truly meant by sufficient indicia of reliability or guarantees of trustworthiness.²⁰⁸

III. IMPLICATIONS FOR THE GEORGIA CHILD HEARSAY STATUTE

The Georgia Child Hearsay Statute, enacted in 1986, allows into evidence out-of-court statements of child victims of physical or sexual abuse describing the abusive acts if the child is available to testify in court and if the court finds that sufficient indicia of reliability, which are undefined, were present when the statements were made.²⁰⁹ In its decision on the first Confrontation Clause challenge to the statute, the Georgia Supreme Court noted that the statute did not clarify the availability requirement, leaving open the possibility that if the prosecution proffered evidence under the rule but did not call the child as a witness, the defendant would be required to call the child as a defense witness in order to exercise his confrontation rights.²¹⁰ Refusing to place such a burden on the defendant without a clear directive of legislative intent, the court constructively amended the statute to require the court, at the request of either party, to call the witness as its own and to inform the jury that it is the court who has called the child as a

205. *Id.* at 743 (citing *Idaho v. Wright*, 497 U.S. 805, 821 (1990)).

206. Milich, *supra* note 201, at 761.

207. *Id.*

208. *See generally id.*

209. O.C.G.A. § 24-3-16 (1981 & Supp. 1992).

210. *Sosebee v. State*, 357 S.E.2d 562, 563 (Ga. 1987). The court's rationale was that jurors might develop prejudice against the defendant for forcing the child to take the stand and be cross-examined. *Id.*

witness. At that time both parties may examine and cross-examine the child.²¹¹

This procedure additionally allows admission of testimony of the victim's statements from both the child and those who witnessed the child's statements, without threat of "bolstering" one's own witnesses.²¹² Because prior consistent statements of witnesses who are present and available for cross-examination under oath are admissible as substantive evidence against an accused in Georgia, such testimony is permissible anyway.²¹³

Like most child hearsay exception statutes, the Georgia statute requires a finding by the court of sufficient indicia of reliability.²¹⁴ However, unlike most statutes, the Georgia law also requires the availability of the child to testify at trial.²¹⁵ The Georgia statute also differs from most state statutes in that it does not require prior notice to the adverse party.²¹⁶

The Georgia statute "protects the defendant's constitutional right of confrontation by affording [a] defendant the dual protection of requiring both the availability of the witness and a sufficient indicia of reliability."²¹⁷ Thus, blatant Confrontation Clause problems do not appear on the face of the statute. Nevertheless, the construction of the statute and its application present questions requiring analysis of Confrontation Clause issues.

A. Availability

As discussed *supra*, if the child is available for trial and cross-examination, the Confrontation Clause is unlikely to be violated. However, although the Georgia statute requires availability to testify, it does not specify the implications of the requirement.²¹⁸ Early decisions held that a child incompetent to testify under the competency statute, which required that the child understand the need to tell the truth, was not available

211. *Id.*

212. *Rayburn v. State*, 391 S.E.2d 780, 782 (Ga. 1990).

213. *Cuzzort v. State*, 334 S.E.2d 661 (Ga. 1985); *Edwards v. State*, 335 S.E.2d 869 (Ga. 1985).

214. *See supra* note 91.

215. *See* O.C.G.A. § 24-3-16 (1981 & Supp. 1992).

216. *See supra* note 57.

217. *Smith v. State*, 405 S.E.2d 78, 81 (Ga. 1991) (citing *Newberry v. State*, 361 S.E.2d 499, 501 (Ga. 1987)).

218. *Sosebee v. State*, 357 S.E.2d at 563.

under the hearsay statute.²¹⁹ To get around this requirement, the Georgia General Assembly in 1989 and 1990 passed amendments to the competency statute providing that child victims or witnesses in all criminal cases were competent to testify.²²⁰ This statute is to be construed with the Child Hearsay Statute and obviates the need to take an oath.²²¹ In fact, if the child does not take an oath and thus appears as an unsworn witness, the child is still "available."²²² However, the statute does not exempt children from competency challenges on the ground that they are mentally retarded.²²³

Case law holds that as long as a child witness is "available for confrontation and cross-examination," the defendant's rights are guarded.²²⁴ Even where the child who takes the stand is completely uncommunicative and unresponsive, refusing to respond to any substantive questions regarding the charges, the child is still "available."²²⁵ "The law requires that the child be available to testify; it does not require the child to corroborate the hearsay testimony."²²⁶ "A witness' responsiveness or unresponsiveness, evasiveness or directness, verbal skills, intelligence, memory, perception, and apparent understanding are all factors which can be assessed by the jury and may raise a reasonable doubt."²²⁷ The defendant's right to a "thorough and sifting cross-examination" is protected where the witness "appears to answer as well as he or she is capable of answering."²²⁸

219. Ward v. State, 368 S.E.2d 139, 140 (Ga. 1988).

220. O.C.G.A. § 24-9-5 provides: "in all cases involving deprivation . . . or in criminal cases involving child molestation, and in all other criminal cases in which a child was a victim of or a witness to any crime, any such child shall be competent to testify." O.C.G.A. § 24-9-5 (Supp. 1993).

221. Bright v. State, 400 S.E.2d 18, 20 (Ga. 1990).

222. *Id.*

223. Sizemore v. State, 416 S.E.2d 500 (Ga. 1992) (holding that children, just like adults, "who do not have the use of reason, such as idiots, lunatics" are incompetent to testify by virtue of O.C.G.A. § 24-9-5(a)).

224. Bright v. State, 400 S.E.2d at 20.

225. *Id.*; see also Byrd v. State, 419 S.E.2d 111, 112 (Ga. Ct. App. 1992).

226. Jones v. State, 407 S.E.2d 85, 86 (Ga. 1991) (holding that the fact that the child's testimony did not corroborate "to any acceptable degree" the hearsay testimony of adult witnesses as to the child's out-of-court statements was evidence for the jury in deciding the child's credibility).

227. Bright v. State, 400 S.E.2d at 20-21.

228. *Id.* at 21 (citing Holmes v. State, 163 S.E.2d 803 (Ga. 1968)).

Thus, the Georgia courts interpret the thrust of the Child Hearsay Statute as providing the jury the opportunity to judge the credibility of the child's accusations.²²⁹ This interpretation does not significantly offend the recent United States Supreme Court holdings regarding the purpose of the Confrontation Clause.²³⁰ Although the opportunity for cross-examination is an important element of the confrontation right, the Court is clear in its holdings that it is the combined effect of the confrontation elements (face-to-face contact, testimony under oath, and the jury's opportunity to observe demeanor, and cross-examination) that assures this right.²³¹ The confrontation right, like other Sixth Amendment rights, is subject to interpretation in the context of the "necessities of trial and the adversary process."²³² Furthermore, in light of the dicta in *White* regarding the irrelevance of the unavailability rule altogether, this issue may not be significant under Confrontation Clause analysis.²³³

B. *Indicia of Reliability*

The elimination of the unavailability rule implies that for the purposes of Confrontation Clause analysis, regardless of whether the declarant testifies at trial, the out-of-court statements must have constitutionally sufficient indicia of reliability to overcome presumptive unreliability.²³⁴ While the Georgia statute does require on its face that "the circumstances of the statement provide sufficient indicia of reliability,"²³⁵ it is questionable whether or not in practice the constitutional standard is met.

Since the Georgia Child Hearsay Statute, like all residual hearsay statutes, does not fall into the category of firmly rooted hearsay exceptions, it does not automatically satisfy Confrontation Clause scrutiny.²³⁶ In fact, a statement offered under it is "presumptively unreliable and inadmissible" unless shown to have particular guarantees of trustworthiness equal to those found in the firmly rooted exceptions.²³⁷ In other words,

229. *Id.*

230. See *supra* notes 112-38 and accompanying text.

231. *Id.*

232. *Maryland v. Craig*, 497 U.S. 836 (1990).

233. See *supra* notes 162-173 and accompanying text.

234. *Younts*, *supra* note 4, at 701.

235. O.C.G.A. § 24-3-16 (1981 & Supp. 1992).

236. See *Idaho v. Wright*, 497 U.S. 805, 818 (1990).

237. *Id.*

the statement must be "so trustworthy that adversarial testing would add little to its reliability."²³⁸

In one way, the construction of the Georgia statute regarding determination of reliability comports with constitutional guidelines. The directive that the "circumstances of the statement" provide the basis for the finding of sufficient indicia is clearly in line with the requirement in *Wright* that corroborating evidence not be used.²³⁹ Furthermore, the Georgia Supreme Court has provided an inclusive list of factors for consideration in facilitating the determination. These factors are similar to those listed in *Wright*:²⁴⁰ atmosphere and circumstances under which the statement was made; spontaneity; child's age; child's general demeanor; child's physical or emotional condition; presence or absence of threats or promises; presence of drugs or alcohol; child's general credibility; presence of coaching; age-inappropriate language; and consistency of repeated statements.²⁴¹ With respect to determining the reliability of videotapes, the additional factor of examination of the procedure followed in making the videotape has been considered.²⁴² Thus, Georgia law seems to contemplate the standard of evaluating the "totality of the circumstances . . . surround[ing] the making of the statement and that render the declarant particularly worthy of belief," as required by the Confrontation Clause.²⁴³

However, the Georgia Supreme Court has held that the finding of sufficient indicia of reliability is not a condition precedent to admissibility of the hearsay statement.²⁴⁴ Instead, the statutory requirement is satisfied if, after conclusion of the trial, there is evidence in the record to support the finding.²⁴⁵ In addition, it is not error for the trial court not to make a specific finding at all; such finding can be inferred simply by the admission of the

238. *Id.* at 921; *see also supra* Part II.

239. *Idaho v. Wright*, 497 U.S. at 822-23.

240. *Id.*

241. *Gregg v. State*, 411 S.E.2d 65, 68 (Ga. 1991). This was reaffirmed in *Weathersby v. State*, 414 S.E.2d 200 (Ga. 1992), and most recently in *Tucker v. State*, 430 S.E.2d 811 (Ga. Ct. App. 1993).

242. *Hunter v. State*, 391 S.E.2d 695, 696 (Ga. 1990).

243. 497 U.S. at 819.

244. 411 S.E.2d at 67. On appeal, the appellate court may consider evidence on record from a pretrial hearing as well as from the trial. *Id.* Consequently, if evidence supporting a finding of sufficient reliability is found, any error resulting from a denial of motion in limine is deemed harmless. *Id.*

245. *Id.*

statement.²⁴⁶ Georgia is unusual with respect to this holding: most states require "a hearing outside the presence of the jury to determine the reliability of proffered hearsay."²⁴⁷

Furthermore, Georgia's policy of admitting the statements without the prior finding of reliability implies that the hearsay is presumed admissible rather than presumptively unreliable and inadmissible unless rebutted by a showing of particular guarantees of trustworthiness, as required by *Wright*. Such a position certainly violates the spirit, if not the letter, of the recent Confrontation Clause holdings.

The emphasis of the United States Supreme Court on the stringent requirements regarding determination of reliability is undeniably clear from the use of such characterizing terms as "particularized guarantees of trustworthiness" and "so trustworthy that adversarial testing would add little to its reliability."²⁴⁸ Equally clear is the current understanding of the purpose of the Confrontation Clause to advance accuracy of the truth-determining process by requiring evidence admitted to be reliable.²⁴⁹ Yet, the Georgia cases rely heavily on the victim's availability alone to satisfy Confrontation Clause challenges.²⁵⁰ It is certainly questionable whether Georgia's practice of admitting hearsay without a prior determination of reliability meets constitutional standards.

CONCLUSION

Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be

246. *Young v. State*, 405 S.E.2d 338, 339 (Ga. 1991).

247. MYERS, *supra* note 33, at 374; *id.* at 374 n.542; *id.* at 229 n.542 (Supp. 1992); *Reynolds v. State*, 363 S.E.2d 249 (Ga. 1988). "Although it may be advisable in some situations to hold such a hearing outside the presence of the jury, we cannot say that failure to do so was error since the trial court ultimately found the statements reliable" *Id.* at 250.

248. *See supra* Part II.

249. *See generally supra* notes 110-11.

250. *See, e.g., Allen v. State*, 428 S.E.2d 73 (Ga. 1993); *Frazier v. State*, 393 S.E.2d 262, 266 (Ga. 1990) (holding that trial court did not err in admitting videotapes without any reference to particularized indicia of reliability, where it instead relied on the victim's availability to satisfy a confrontation challenge); *see also, e.g., Young v. State*, 405 S.E.2d 338 (Ga. 1991); *Reynolds v. State*, 363 S.E.2d 249 (Ga. 1988).

guilty injure only those wrongfully accused and, ultimately, ourselves.²⁵¹

These words of Justice Marshall have relevance to analysis of the Georgia Child Hearsay Statute because the statute is essentially an attempt to provide a shortcut in the prosecution of child sexual abuse cases by allowing presentation of much evidence that might not otherwise be admissible. In fact, the statute has had a significant impact on the prosecutability of abuse cases.²⁵² This is partially due to the fact that evidence is available where otherwise there would be none,²⁵³ and partially due to the fact that the child's credibility may be enhanced by the additional testimony of others to whom the child has told the story.²⁵⁴ Thus, the statute undeniably serves the important state interest of protecting the public through effective prosecution of alleged criminals.²⁵⁵

By requiring the child declarant of hearsay statements to be available to testify, the statute does not provide a means of protecting children from the potential trauma of testifying in court.²⁵⁶ Nonetheless, the child may receive some consolation in having corroborating evidence through other evidence in the form of oral testimony or videotape.²⁵⁷

The effect of the statute on the rights of criminal defendants is an issue of concern.²⁵⁸ The Supreme Court's current characterization of confrontation rights may not be as strong as it once was, given the court's recent interpretation that the purpose of confrontation may be compromised with the "necessities of trial and the adversary process in order to promote the truth-determining process."²⁵⁹ However, the Court is emphatic in its

251. *United States v. Salerno*, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting), quoted in G. Russell Nuce, Note, *Child Sexual Abuse: A New Decade for the Protection of our Children?* 39 EMORY L.J. 581, 583 n.15 (1990).

252. Telephone Interview with J. Tom Morgan, District Attorney for DeKalb County, Georgia (Nov. 6, 1992). Mr. Morgan is nationally known for his ardent prosecution of child abuse cases. *Id.* As a member of the faculty of the National College of District Attorneys, he teaches child abuse prosecution throughout the United States and Europe. *Id.*

253. See *supra* notes 21-26 and accompanying text.

254. See *supra* notes 27-29.

255. See *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

256. See *supra* notes 16-18 and accompanying text.

257. *Id.*

258. Yun, *supra* note 21, at 1748.

259. *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

requirement of a determination of reliability within fairly strict guidelines.²⁶⁰ The Georgia courts pay only lip-service to this doctrine. While the Georgia Child Hearsay Statute requires a finding of indicia of reliability within constitutional guidelines on its face, there is no requirement of a preliminary determination—and actually no requirement that a specific finding be made at all. These facts suggest that the courts are not truly considering the proffered hearsay to be presumptively unreliable and therefore inadmissible, as the Confrontation Clause holdings require.²⁶¹

Instead, the Georgia courts, in their construction of the requirements of the statute, are relying solely on the fact that the child is available to testify and be cross-examined, whether or not meaningfully.²⁶² Furthermore, since the hearsay statute is now construed with the amended competency statute, the meaning of “availability” arguably has taken on a different meaning than it was intended to have when the hearsay statute was enacted.²⁶³ This fact makes a strict, separate, and individualized determination of reliability even more imperative.²⁶⁴ In addition, by requiring availability on its face, the statute also rejects hearsay testimony of a child who is truly unavailable, such as one who is dead.

Thus, the current interpretations of the Georgia statute seemingly do not protect the criminal defendant’s confrontation rights to the extent required by the United States Supreme Court because they are not requiring a specific showing of sufficient indicia of reliability. As discussed, these required indicia (particularly if defined as being tantamount to the trustworthiness of “firmly rooted hearsay exceptions”) may not be so substantial anyway. Nevertheless, a particularized finding of trustworthiness provides the criminal defendant with some assurance that his constitutional rights are not being violated.

260. See *White v. Illinois*, 112 S. Ct. 736 (1992); see also *Maryland v. Craig*, 497 U.S. at 850.

261. *Idaho v. Wright*, 497 U.S. 805, 818 (1990).

262. See *supra* note 247 and accompanying text.

263. With the decision of *Bright v. State*, there is no competency standard for child witnesses in child abuse prosecutions and thus, all victims are presumptively “available” regardless of their actual amenability to effective cross-examination, the meaning of “availability” changed significantly from the original use of the word, presumably chosen by the General Assembly for its original meaning. *Bright v. State*, 416 S.E.2d 500 (Ga. 1992).

264. See *supra* note 247 and accompanying text.

Georgia, like most states that have passed procedural reforms in order to enhance prosecutability of child sexual abuse cases, must heed Justice Marshall's admonition regarding honoring the presumption of innocence. Child physical and sexual abuse is horrifying to the public, but the state must not overreact by shortcutting justice. On the other hand, children deserve protection. In addition to making sure that the Child Hearsay Statute is constitutional as applied by providing for a substantive analysis of the trustworthiness of the statement and a meaningful opportunity for the accused to confront his accusers, Georgia needs to consider amending the statute to provide some alternative for the statement of a child who is truly unavailable. In this way the interests of all parties—the state, the public, the defendant, and the child—can be protected.

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